No 569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

FRANK TOT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

Reference to Opinion Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 74) is reported at 131 F. 2d 261.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered October 28, 1942. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended 28 U. S. C. A. 347. The petition to review the decision of the Circuit Court of Appeals herein was granted by this Court on January 11, 1943.

Statement of the Case.

(a) Statement of Question Involved.

1a: Whether the trial court erred in denying the motion of petitioner for a directed verdict of not guilty.

1b: Whether a presumption created by statute disappears when testimony which rebuts and is contrary to the presumed fact is put in.

2: Whether the statutory presumption provided in Section 2f of the Federal Firearms Act of 1938 (52 Stat. 1250, 15 U. S. C. 901-909) is constitutional.

(b) Constitutional and Statutory Provision Involved.

The pertinent parts of the Fifth Amendment to the Constitution and the pertinent provisions of the Federal Firearms Act of 1938 are printed in the Appendix.

(c) Statement of Proceeding.

An indictment was returned by the grand jury for the United States District Court for the District of New Jersey charging petitioner, a person who had previously been convicted of a crime of violence, with having knowingly, unlawfully and feloniously received a thirty-two calibre Colt automatic pistol which had been shipped and transported in interstate commerce in violation of the Federal Firearms Act (Title 15 U. S. C. 902f.)

A motion was made to quash the indictment which was denied.

The case proceeded to trial before the court and a jury. At the close of the government's case a motion was made for a directed verdict. The motion was denied and an exception was prayed for and allowed. At the end of the entire case a motion was again made for a directed verdict. This motion was also denied and an exception was prayed for and allowed. The jury returned a verdict of guilty. A motion was then made to set aside the verdict and grant a new trial. This motion was denied. The court sentenced petitioner to imprisonment for a period of two years.

(d) Statement of Facts.

In the early morning of September 22, 1938, agents of the Federal Bureau of Investigation armed with a warrant for the arrest of Frank Tot, which warrant charged him with theft from an interstate shipment, went to his home in Newark, New Jersey, for the purpose of arresting him and searching his home. The premises to be searched, which were occupied by Frank Tot as a residence, were located on the second floor of a two-family dwelling. Upon arriving at the premises two of the agents remained in the front of the house while two others went to the rear. The two agents who went to the rear of the house were admitted by petitioner to the portion of the premises in which he lived. He was placed under arrest and one of the agents went to the front of the building and admitted the other two agents and then a search of the premises was begun. One of the agents went to a wardrobe and found in the pocket of a coat hanging there a 32 calibre Colt Automatic Pistol. This pistol had been manufactured by the Colt Com-

pany and shipped by them on September 23, 1919 to Chicago, Illinois.

Some years previous to his arrest on this day Frank Tot had been convicted of a charge of assault and battery and a charge of breaking and entering.

The pistol which was seized was obtained by petitioner some time in 1933 or 1934 and had been continuously in his possession from then up until the date of its seizure.

The statute under which the indictment was drawn was effective as of July 30, 1938.

(e) Specification of Errors Intended to Be Urged.

1: Whether or not where the undisputed evidence shows that petitioner received the pistol in intrastate commerce the case may nevertheless be submitted to the jury because of a statutory presumption.

2: Whether or not the Federal Firearms Act of 1938, 15 U. S. C. 902f is constitutional.

(f) Summary of Argument.

Both the trial court and the Circuit Court of Appeals held that the motions for direct verdicts were properly denied and that Section 2f of the Federal Firearms Act of 1938 does not violate the Constitution.

Petitioner contends:

1: That the motions for directed verdict should have been granted.

This proposition is supported by the following:

A: The government offered no evidence on its original case to show that the pistol had ever been in interstate commerce.

B: The government relied entirely upon the presumption created by statute. The petitioner testified and offered other evidence which contradicted the presumption. The presumption having been contradicted and the government have failed to offer proof to rebut this there was nothing in the case to submit to a jury.

2: That section 2f of the Federal Firearms Act of 1938 is violative of the Fifth Amendment to the Constitution.

This proposition is supported by the following:

A: The presumption contained in the statute constitutes a deprevation of liberty without due process of law.

B: There is no rational relation between the fact proved and the ultimate fact presumed.

C: The presumption set up precludes one from the right to present his defense to the main fact presumed.

ARGUMENT.

POINT I.

There was no question of fact in the case to submit to a jury for its consideration.

The trial court erred in denying the motions for directed verdicts of "not guilty" because of the fact that the presumption created by statute disappeared as the result of contrary testimony being introduced.

In the trial of the case the Government in the first instance proved that the pistol was found in the possession of petitioner and the pistol was offered and admitted in evidence. It also proved, that the petitioner had been convicted of crimes involving violence. The Government then rested.

Petitioner took the stand and testified that he had been in possession of the pistol which was in evidence since 1933 or 1934, a number of years prior to the enactment of the statute under which the indictment was drawn. This testimony was corroborated by two other witnesses.

In rebuttal the Government offered evidence to show that the pistol in question had been shipped from Connecticut to Illinois in 1919 and then rested its case.

The foregoing recitation of the facts covers all of the facts which are pertinent to the question raised under this point.

That a person charged in an indictment with the crime is presumed to be innocent until proven guilty beyond a reasonable doubt is one of the fundamentals of our system of jurisprudence and of the essential substance of trial by jury as guaranteed by the Constitution.

In the instant case the Government offered no evidence whatsoever to show that petitioner committed the offense charged in the indictment but relied solely and exclusively upon the presumption created by the statute.

Though the law in its development has permitted the enactment of statutes which create presumptions it has been uniformly held that any statute which creates a presumption which operates to deny a fair opportunity to rebut it is in violation of the Constitution.

Heiner, Collector of Internal Revenue vs. *Donnan, et al.*, 285 U. S. 312;
Bailey vs. *Alabama*, 219 U. S. 219;
Manley vs. *Georgia*, 279 U. S. 1;
Mobile, Jackson & Kansas City R. R. Co. vs. *Turnipseed*, 219 U. S. 35.

A statutory presumption even if valid, and we contend in the following point that the presumption here is invalid, can never take the place of the utter lack of evidence shown here. The presumption in this statute is only *prima facie* evidence. When petitioner took the witness stand and testified that he had purchased the pistol in intrastate commerce and had had possession of it long prior to the enactment of the statute the presumption vanished. Therefore, it could not support a conviction in the absence of evidence that the pistol had been shipped and transported and received in interstate commerce subsequent to the effective date of the statute.

The limits of the rule that the burden of proof may be shifted from the Government to a defendant in a criminal prosecution are in substance that the Government shall have proved sufficient to make it just for the defendant to be required to repel what has been proved with excuse or explanation or at least that upon the balancing of conveniences or of the opportunities for knowledge the shift of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

Morrison vs. *People of State of California*, 291 U. S. 82;
Yee Hem vs. *United States*, 268 U. S. 178.

The peculiar effect of a presumption of law is merely to invoke a rule of law compelling the jury to reach a conclusion which squares with the presumption in the absence of evidence to the contrary. If evidence is offered contrary to the presumption the presumption disappears and the case is ~~in~~ the hands of the jury free from any rule of presumption.

Wigmore on Evidence, 3rd Edition, Section 2491.

The effect of a presumption is to envoke a rule of law which compels the jury to return a verdict in accordance therewith, in the absence of any evidence to the contrary from the other side. If the opponent does present such evidence, then the presumption vanishes, and the jury may consider the proof free from any such rule. Thus, the presumption that death resulted from an accident or natural causes rather than from suicide, the presumption of due care or freedom from negligence, the presumption that an official or official body charged with the performance of governmental duties acted honestly in his or its official duties, the presumption of good character in behalf of the defendant in a criminal prosecution or the presumption of the relationship of master and servant existing between the owner of a car and the driver thereof when met by rebutting proof is not evidence and is not to be treated as such by the jury in arriving at a verdict. Such a presumption merely aids in establishing a *prima facie* case and has no probative effect when countervailing proof is given.

The presumption alone contributes no evidence but merely takes the place of evidence temporarily and if and when evidence is introduced to rebut the presumption it

disappears and goes for naught. For the rule is that presumptions disappear when facts appear and facts are deemed to appear when evidence is introduced from which they may be found.

Ryrrell vs. *Prudential Insurance Co.*, 192 Atl. 184;
Essmeister vs. *Roadway Transit Co.*, 275 Mich. 387;
Normandin vs. *Parentean*, 150 Atl. 460;
Carroll vs. *Prudential Insurance Co.*, 15 Atl. 2d 810;
Hoffman vs. *Lassaeff, et al.*, 164 Atl. 293;
Dunn, et al. vs. *Goldman, et al.*, 168 Atl. 299;
Alpine Forwarding Co. vs. *Pennsylvania Railroad Co.*, 60 Fed. 2d 734;
Connecticut Mutual Life Ins. Co. vs. *Lanahan*, 112 F. 2d 375;
20 Am. Jr. 179, evidence Sec. 166;
Minutella vs. *Providence Ice Cream Co.*, 144 Atl. 884;
Rhodes vs. *Pennsylvania R. R. Co.*, 147 Atl. 854;
E. S. Co., Inc. vs. *Rocheleau*, 161 Atl. 145;
Waters vs. *Western & Southern Life Ins. Co.*, 178 Atl. 499;
Kelly, et ux. vs. *Hudson Coal Co.*, 179 Atl. 753;
Domanawski vs. *Prudential Insurance Co.*, 182 Atl. 906.

Petitioner, rebutted the presumption by direct testimony that the pistol was not received by him in interstate commerce but was in fact received by him in intrastate commerce long prior to the enactment of the statute.

Though he was not corroborated in his testimony as to how he obtained possession of the pistol he was corroborated as to the time of acquisition. This evidence having been offered the presumption quit the arena and had no probative force and effect and left the case barren of any

evidence whatsoever of the commission of the crime charged.

McIver vs. *Schwartz*, 145 Atl. 101;
Caswell vs. *Maplewood Garage*, 149 Atl. 747;
Podolsky, et al. vs. *Sautter*, 133 Atl. [illegible]

It has been the contention of the Government that the case was rightfully submitted to the jury because of the fact that the jury should have a right to decide upon the credibility of the petitioner and his witnesses.

Can it be successfully stated that a presumption has credibility; that a presumption has probative force or effect? If a presumption is given such force and effect is it not in effect unrebuttable? If it has such force and effect is it reasonably possible for one who has been convicted of crime to combat it?

The law is clear that a defendant need not conclusively prove beyond all doubt that he is innocent of the charge contained in the indictment but need merely deny the *prima facie* case proven by the use of the presumption. If this denial is uncontradicted there remain no facts to present to the jury.

Even if the testimony of the witnesses called by the defendant might not be believed by the trial court, their testimony standing uncontradicted by other testimony, the presumption is rebutted.

Hoffman vs. *Lassaeff*, *supra*;
McIver vs. *Schwartz*, *supra*.

The only question of fact involved in the instant case insofar as this point of our argument is concerned is whether

or not the petitioner received the pistol after it had been shipped or transported in interstate commerce subsequent to July 30, 1938, the effective date of the statute. Proof of this was utterly lacking and the presumption created by statute was invoked to take the place of evidence which under ordinary circumstances would have been required to prove a *prima facie* case. The testimony of petitioner and his witnesses clearly rebutted the presumption. This testimony was neither contradicted in itself nor were any witnesses called to contradict it. In view of this the presumption quit the arena and there was no question of fact to submit to the jury.

The fact that the jury did not believe the defendant's story of how he obtained the pistol is of no importance. There are hundreds of other ways in which he could have obtained it; all through intrastate commerce. The fact that the jury did not believe the defendant's story still does not prove that the pistol was received in interstate commerce.

If the statute means that the defendant must have received, shipped or transported the article in the course of interstate commerce the court should have directed a verdict of not guilty because it must be conceded that there was no evidence of such fact.

Where there is no evidence to support an indictment it is the duty of the trial court to direct a verdict of not guilty or to dismiss the indictment.

Kassen vs. *United States*, 87 F. 2d 183.

It is therefore respectfully submitted that the trial court erred in denying petitioner's motions for directed verdicts of acquittal both at the end of the Government's case and at the end of the entire case.

POINT II.

The Statutory presumption is unconstitutional.

A second and independent ground for setting aside the conviction and discharging of petitioner is that the statutory presumption is invalid because it is violative of the Fifth Amendment to the Constitution of the United States.

If the statutory presumption set up in the statute in question is to have the effect which the Government has contended should be given to it it would take from the constitution guaranty of due process all substance by opening wide the door to legislative evasion of the fundamental purposes of its guaranty which is rooted in sad experience with governmental oppression; rotted in "blood, sweat and tears".

We do not contend that Congress cannot constitutionally set up a statutory "presumption" we do contend however that where Congress sets up such a presumption there must be some (1) rational relation or connection between the fact proved and the ultimate fact presumed; and (2) that the presumption set up must not preclude one from the right to present his defense to the main fact so presumed.

We do contend that the presumption set up in the statute here considered fails to square with these limitations.

Miyshi v. United States, 131 F. 2d 614;
Bailey v. *Alabama*, 219 U. S. 219 (1911);
McFarland v. *American Sugar Refining Co.*, 241 U. S. 79 (1916);
Manley v. *Georgia*, 279 U. S. 1 (1928);
Western R. R. Co. v. *Henderson*, 279 U. S. 639 (1928);

Morrison v. *California*, 291 U. S. 82 (1934);
State v. *Beswick*, 13 R. I. 211;
State v. *Katz*, 13 R. I. 528;
State v. *Grimmett*, 33 Idaho 203;
Casey v. *U. S.*, 276 U. S. 394;
Gloria v. *United States*, 231 U. S. 9;
Brightman v. *United States*, 7 F. 2d 532;
People v. *Licavoli*, 264 Mich. 643.

It is admitted that Congress may under its power to regulate interstate commerce make it unlawful for anyone to receive firearms shipped or transported in interstate commerce.

We submit however that Congress is without constitutional power on the basis of mere possession of a firearm within a State to set up a presumption that the arm possessed was shipped, transported or received "as the case may be" in interstate commerce.

In a long line of decisions including the decisions in the cases of

United States vs. *Darby Lumber Co.*, 312 U. S. 100;
Jacob Ruppert Inc. vs. *Caffe*, 251 U. S. 264;
Westfall vs. *United States*, 274 U. S. 256;
Shreveport Case, 234 U. S. 342;
Mulford vs. *Smith*, 307 U. S. 38.

It has been held that Congress has a right to regulate interstate commerce and to regulate intrastate transactions which are so co-mingled or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. However, though Congress has for illustration under these and similar decisions power to legislate as to the wages and hours of employees of the

operators of a loft building leased, though only in part, to tenants engaged in interstate commerce, the power does not extend to situations in which none of the tenants are engaged in interstate commerce.

No one could contend that it was within the power of Congress to set up on the basis of the mere fact of ownership, possession or operation of a loft building a presumption that the owners, possessors or operators and their employees were engaged in interstate commerce and that their activities in ownership, possession and control so affected interstate commerce as to bring their relations with their employees *prima facie* within the power of Congress and put upon them the burden of proof or of going forward with evidence, to establish, that they and their employees were not engaged in interstate commerce.

Congress has constitutional power under the commerce clause to prohibit the shipping, transporting or receiving of the manufactured products of child-labor in interstate commerce.

Would it be contended from this that Congress can set up a presumption that all products of child-labor possessed within a State were shipped, transported and received in interstate commerce?

Congress has constitutional power to prohibit the shipping, transporting or receiving of explosives in interstate commerce.

Does it follow that Congress has power to set up a presumption that all explosives possessed within a State shall be presumed to have been shipped, transported or received in interstate commerce?

We submit that none of these questions can be answered in the affirmative.

There is no rational relation between mere possession of a firearm in a State and the presumed ultimate fact of the receipt of such arm through shipment or transportation in interstate commerce.

Is it rational to presume the very fact upon which the power of Congress rests and to which it is limited—an act in interstate commerce—from the fact of mere possession; a fact that rests solely within the regulatory and prohibitive power of the State?

The cases on presumptions as to venue are of interest in this connection:

Brightman v. *U. S.*, 7 Fed. (2d) 532;
Crain v. *U. S.*, 12 Fed. (2d) 580;
Hood v. *U. S.*, 14 Fed. (2d) 925;
De Moss v. *U. S.*, 14 Fed. (2d) 1021;
O'Neill v. *U. S.*, 19 Fed. (2d) 322.

Mere possession is one thing. Receipt in interstate commerce is another.

The statute recognizes this in that it provides for drawing from the fact of "possession" another fact—not receipt—but receipt through shipment or transportation in interstate commerce.

The statutory presumption here involved not only provides for a presumption of shipping or transporting and receipt of the arm in interstate commerce from the unrelated fact of intrastate possession but also, if the government's claim is sound, for a presumption as to the time of such receipt in interstate commerce.

In order to sustain the conviction in the instant case it must be claimed that "possession" provides a basis for presumption that (a) the firearm was shipped in interstate commerce; (b) was received in interstate commerce; and (c) that it was so received after the effective date of the statute.

Surely there is no reasonable relation between the fact of possession on September 22, 1938 and the fact presumed of receipt in interstate commerce after the effective date of the statute, July 30, 1938, especially when the only scintilla of proof of interstate shipment relates to a date nineteen years earlier. Even the common law presumption arising from mere possession of stolen goods is limited to goods recently stolen.

Is it not beyond the realm of reasonable inference to presume on mere possession that on September 22, 1938 (a) receipt through interstate shipment, (b) receipt after July 30, 1938 of an interstate shipment?

Can a statutory presumption constitutionally wholly take the place of proof of guilt?

Can it constitutionally wholly take the place of proof of guilt beyond a reasonable doubt?

Can it constitutionally be made to take the place of proof as to the very fact upon which the constitutional power of Congress depends?

If it is to be contended that the presumption does not rest upon possession alone but that it rests upon possession by one "convicted of a crime of violence" that fact cannot overcome our argument. Just as there is no rational rela-

tion between mere possession and the receipt, after a given date, in interstate commerce, there is no rational relation between possession by one convicted of a crime of violence and the receipt after a given day in interstate commerce.

If the presumption that the pistol was received subsequent to the effective date of the statute must stand or fall under the "rational connection" test the presumption is patently indefensible, particularly, because of the tremendous disparity in opportunity of receipt before rather than after the statute.

The effective date of the statute was July 30, 1938, thirty days after passage. The possession of the pistol was proved as of September 22, 1938. But acquisition not possession in the substantive crime. Even disregarding petitioner's testimony of receipt in 1933 or 1934, the one fact remotely indicative of the time of acquisition is the date of the manufacturers shipment of the pistol, September 23, 1919, nineteen years almost to the day prior to the possession date. The chance of acquisition during the less than two months between enactment and proved possession rather than during the many years of the pistol's circulation prior to the enactment, is so negligible that the case had no right to go to the jury unless the statutory presumption from the possession went to the time as well as the manner of acquisition.

Therefore, it ought not to be concluded that Congress designed "reflexive reference" in setting up the presumption and included time of receipt in the presumption and if it should be so concluded and given such effect the presumption violates the "rational relation" constitutional limitation upon statutory presumption.

If the presumption be regarded as requiring a defendant to come forward with evidence of the actual details of an acquisition transaction before the statute it would be difficult to justify the presumption under the "accessibility of proof test" because of the difficulty of locating and stimulating the memory of a transferor as to a transaction which in the absence of a gun law might have been quite casual at the time.

As there is no rational relation between possession and the presumption that the pistol was received subsequent to the effective date of the statute and as the presumption cannot be justified under the "accessibility of proof test" what remains but to condemn the statutory presumption as violative of due process.

Between the enactment date and the effective date of the statute there was a period of thirty days during which the petitioner could have created evidence to show his possession prior to the effective date of the statute. However, can one before the effective date of a statute be put in a position requiring him, through an arbitrary presumption, to build up perpetuating testimony and be subjected to the risk of an unjust conviction because perchance his perpetuating witnesses are not credited or because the very making of the record for purposes of perpetuation raises doubt in the mind of the jury as to the truth of the fact sought to be substantiated by the record so made?

To say as the Government claims that where there is uncontradicted testimony that the acquisition of the pistol was in intrastate commerce and where there is no testimony that the pistol was acquired in interstate commerce, disbelief by the jury of the testimony as to the particular manner of acquisition in intrastate commerce lays the basis for

acquisition in interstate commerce resting solely on the statutory presumption, is to give the statutory presumption substantive evidential force.

Such claim by the Government involves not merely a claim that the statute shifts the burden of going forward but in fact a claim that it shifts to the accused the burden of proof.

If, as is the fact, composition of the jury as consisting of twelve members, and the requirement of unanimity in verdict are of the essence of trial by jury, as guaranteed by the Constitution, it is respectfully submitted that the requirement of proof of guilt beyond a reasonable doubt is equally of the essence of such trial.

It is respectfully submitted that if a statutory presumption is given the effect here claimed by the Government, the petitioner under the circumstances here present, is, as the accused, denied trial by jury according to the common law; denied the benefit of the common law presumption of innocence and of the common law rule against conviction except where guilt is established beyond a reasonable doubt.

Of what avail is it to say that one accused shall constitutionally enjoy the right to be confronted with the witnesses against him, if it be true that he may be convicted on the basis of a mere arbitrary presumption as to the fandamental fact upon which conviction under the statute must rest.

An arbitrary presumption is not constitutionally the equivalent of the constitutional right of one accused to be confronted by witnesses.

The Circuit Court of Appeals for the Sixth Circuit in construing the presumption in the Statute in question in the case of *Minski* v. *United States*, 131 F. 2d 614, said

> "The guaranty of the due process clause of the Fifth Amendment is, that a law shall not be unreasonable, arbitrary or capricious, and we think that the presumptive evidence clause of the act here involved must fall before the constitutional inhibition."

We therefore submit that for these reasons the statute is violative of the Fifth Amendment to the Constitution and therefore the conviction of petitioner should be reversed.

Conclusion.

We submit that the trial court erred in refusing to grant petitioner's motions for directed verdicts because of the fact that there was no evidence to submit to the jury.

We further submit that regardless of how the statute is otherwise construed the presumption contained in the statute is invalid and in violation of the constitutional prohibition.

We respectfully urge that the verdcit and sentence should be reversed and the defendant discharged.

Respectfully submitted,

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APPENDIX.

The pertinent part of the Fifth Amendment provides:

> "No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law • • •."

The pertinent parts of the Federal Firearms Act of 1938 15 U. S. C. 902f provides:

> "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."